

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 11, 2005

ERIKA EAST v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Rutherford County
No. F-53617 Don R. Ash, Judge

No. M2003-02329-CCA-R3-PC - Filed June 22, 2005

The Petitioner, Erika East, filed a petition for post-conviction relief contending that she received ineffective assistance of counsel. After a hearing, the post-conviction court denied the Petitioner's request for post-conviction relief. Finding no reversible error, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

G. Kline Preston, IV, Nashville, Tennessee, for the appellant, Erika East.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and John W. Price, III., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the denial of the Petitioner's petition for post-conviction relief. The Petitioner was charged with first degree murder and conspiracy to commit murder in the shooting death of her husband. She pled guilty to first degree murder on March 7, 2002. Following her guilty plea, the trial court sentenced the Petitioner to life in prison. The Petitioner subsequently filed a petition for post-conviction relief, alleging that her guilty plea was involuntarily and unknowingly submitted because she received ineffective assistance of counsel. On July 31, 2003, at the Petitioner's post-conviction hearing, the following evidence was presented: Jason Whatley testified that he was the Petitioner's original counsel, and he withdrew as counsel around the time of the Petitioner's arraignment. Whatley testified that he had planned on filing a motion to suppress the Petitioner's confession because she requested counsel prior to confessing to this crime. He said that the suppression issues were not a "slam dunk," but he "probably would have pursued" the

suppression issue. Whatley said that he also considered filing a motion to suppress the Petitioner's statement because the Petitioner informed him that, when she confessed, she was in shock about her husband's death and had been awake for an extended period of time.

He recalled that he considered a possible temporary insanity defense, and the Petitioner was evaluated by the guidance center, but the Petitioner was deemed mentally competent. Whatley said he did not file a discovery request because he withdrew as counsel before he would normally have filed the request and because the State had granted him free access to their files. He recalled that he and the Petitioner discussed the possibility of a defense based on the Petitioner's statements to him about domestic abuse and on his talks with the Petitioner's parents about the Petitioner's possible manic depression and previous attempts at suicide. Whatley testified that the Petitioner's case was "very difficult . . . from the standpoint of defending it and finding a logical and reasonable posture to take from the defense standpoint." He recalled that he discussed the case with Brad Hornsby ("Counsel"), the attorney who took the Petitioner's case following Whatley's withdrawal. He did not recall the specifics of their discussions, but he said that he went over the highlights and gave his file to Counsel.

On cross-examination, Whatley testified that he had believed the Petitioner was very familiar with the evidence and facts in her case. He said that he and the Petitioner reviewed her videotaped confession, which was "several hours long," together. Whatley testified that, although the Petitioner may have been "sketchy" on the details before viewing the tape, after they watched it, the Petitioner was clear on what was said. He could not be sure exactly when the Petitioner had made the requests for counsel, but he believed those requests were made on the Petitioner's way to the police station or when the interview was not being recorded. Whatley could not recall exactly what the Petitioner told him she said, but he thought she had used the words "counsel" or "an attorney." Whatley agreed that the Petitioner never asked for counsel during the videotaped interview and that she never asked to stop the interview. He said that the mental evaluation done by Dr. Stuber, at the Guidance Center, revealed no possible defenses based on a diminished mental capacity or other mental issues. He explained, however, that he had concerns about the length and thoroughness of the interview because Dr. Stuber only spent approximately fifteen minutes with the Petitioner during the evaluation.

Whatley recalled that, in addition to the confession, the State also had as evidence against the Petitioner a 911 recording in which the Petitioner claimed that her husband had committed suicide. Further, Whatley said, the autopsy report indicated that the victim suffered two gunshot wounds to the head, a fact that was inconsistent with suicide. He said that, although the ballistics report was not complete when he withdrew from the case, there was no issue regarding the fact that the gun obtained for evidence fired the two shots that killed the victim and that the Petitioner had pulled the trigger. Whatley recalled that, although the Petitioner mentioned some abuse in her relationship with her husband, the Petitioner mentioned only one instance of mild physical abuse, she had never made an official report of any abuse, and the verbal abuse that she described did not seem to him to be "something that could drive a person over the edge." Whatley did not recall any documentation that the Petitioner had been diagnosed with depression or the like, but he said that, based on the Petitioner's family's history of mental illness, including depression and suicide, he had

considered obtaining a psychiatric evaluation of the Petitioner. Whatley agreed that the State had a very strong case against the Petitioner, even without the videotaped confession.

On redirect examination, Whatley explained that he considered a defense based on some mental issues because, whenever he spoke with the Petitioner, she had a calm, reserved, and rational demeanor, and he could not understand how a person with such a demeanor could commit the crime with which the Petitioner was charged.

Counsel testified that he was the third attorney appointed to represent the Petitioner, following Whatley's withdrawal and the withdrawal of a second court appointed attorney who withdrew based on inexperience. Counsel said that he did not seek funds from the court to hire an investigator in this case because he had a law student clerking for him who was able to review all the tapes and transcribe them at no extra cost to the State. He said that his clerk did not do any forensic investigation of the case. Counsel recalled that he did not file a motion for discovery in this case because the State had allowed him full access to its file. He did not specifically remember discussing with Whatley any issues regarding the possible suppression of the Petitioner's statement. He did remember discussing with Whatley a possible battered wife's syndrome defense, and he said that he checked the victim's criminal record, "which was a little bit extensive." He explained that he did not get a psychiatric evaluation of the Petitioner for such a defense because the Petitioner told him on several occasions that she had not been battered. He recalled that the Petitioner did mention some instances of arguing, but no physical abuse. Counsel testified about his billing statement submitted to the State in this case. He explained that, in August, after he was assigned the case in May, he spoke with one of his law partners, who is also married to a doctor, regarding the possible defenses and strategies in the Petitioner's case. He said that he did not file any motions to suppress in this case, and he said that the case was never set for trial. Counsel testified that the Petitioner never told him that she asked for an attorney prior to giving her statement to police, and he said that she only "indicated that she thought about [asking for an attorney]." He said that he and the Petitioner discussed the possibility of raising a diminished capacity defense and discussed a battered wife's syndrome defense, and he determined that neither was a sound strategy based on Dr. Stuber's report and the Petitioner's statements that she was not physically abused.

Counsel testified that the Petitioner had full access to his file and all the information about her case. He said that, from the Petitioner's taped statements and his own conversations with her, he learned that she and a co-defendant, her roommate, had planned the crime and had shot a bullet through a wall the day before the murder. He said that the Petitioner's co-defendant committed suicide before the Petitioner pled guilty, and the co-defendant left a note, but he explained that the note did not contain information regarding the case. Counsel recalled that he and the Petitioner reviewed the elements of the lesser-included offenses of murder, and he said that he attempted to negotiate a plea agreement for a lesser charge. He explained that he even discussed with the Petitioner the potential benefits and problems with trying to place the blame on the co-defendant. He explained that he did not see how such a strategy could prevail, considering the evidence against the Petitioner, including the details of her statement that, after she shot the victim once, she told him to go back to bed, and shot him a second time. Counsel explained that, although he did not file a

motion to dismiss, he did prepare one, based on the issue of a speedy trial, to obtain a better negotiating position.

On cross-examination, Counsel testified that the Petitioner was out on bond during the pendency of her case, and she had free access to him and all of the information concerning her case. He said that there were no instances where she tried to see him and was unable to do so. Counsel identified the facsimile sent by Whatley to Dr. Stuber that outlined the facts that Whatley wanted Dr. Stuber to consider in making his evaluation on the Petitioner's possible diminished capacity. Counsel said that he received a copy of the facsimile, along with Dr. Stuber's evaluation, when he took over the case. He said that the Petitioner never indicated that she wished to add to those facts, and he said that the facts did not, in his opinion, support a diminished capacity defense. Counsel recalled that the Petitioner had the option to submit a plea on the scheduled plea date or to defer her plea until a later date, and he said that the Petitioner chose to plead guilty on the scheduled plea date. He said that the Petitioner "wanted to go ahead and get it done." Counsel testified that he gave the Petitioner a copy of the transcript of her videotaped statement to the police, and he even made copies of the videotapes of her statements. Counsel said that the video revealed nothing that indicated that the Petitioner's statement was coerced. He said that the Petitioner never told him that her statement was involuntary, and he stated that the Petitioner never indicated that she had asked for an attorney before she gave her statement. Counsel testified that the Petitioner's alleged request for counsel, that she asked a patrol officer for a phone call, was not the equivalent of a request for an attorney. He said that he reviewed the Miranda rights explanation on the videotape, and it appeared that the Petitioner was fully explained her rights and waived them voluntarily. Further, he explained that he reviewed the Miranda rights with the Petitioner to ensure that she had fully understood them as they were explained to her at the time she gave her statement. Counsel testified that the Petitioner never indicated that the police prevented her from using the restroom or taking a break to get a drink. The Petitioner never indicated that the police officers were disrespectful or inappropriate in any way, and Counsel did not see anything on the videotapes to the contrary. Counsel recalled that the trial court had admonished the parties not to file frivolous motions, and Counsel said that, had he "seen any glimmer of hope" for a motion to suppress, he would have filed it.

He said that the Petitioner did not report any history of mental illness, and he was able to communicate with the Petitioner without any problem. He explained that he considered Whatley's concerns about Dr. Stuber's evaluation, but he concluded that he had no grounds to proceed on any diminished capacity issues. Counsel testified that because the victim was shot in his sleep, and because the shooting was planned a day prior, he felt that battered wife's syndrome was not a sound defense.

Counsel testified that, had the Petitioner's statement been suppressed, the State still had considerable evidence against her. He admitted that, because the co-defendant had committed suicide, it would have made the State's case more difficult to prove, but he reasoned that the State would have still had the two separate gunshots, the Petitioner's 911 call, forensic evidence, and also would have sought to admit the co-defendant's statement. Counsel agreed that the Petitioner's plea agreement called for a sentence of life in prison, with a minimum of 51 years to serve, and he said

that the benefit of the plea agreement was to avoid the possible sentences of life without parole, or even the death penalty. He admitted that, at the time the plea was agreed upon, the State had not given any notice that it would seek the death penalty or life without parole.

The Petitioner testified that she pled guilty to first degree murder after reviewing plea paperwork with Counsel. She said that she and Counsel discussed the possibility of suppressing her statements on the basis of a theory of diminished capacity, but that Counsel did not think it would be successful. She recalled asking Counsel, on several occasions, if he had attempted to suppress her statements to the police, and she said that Counsel always responded in the negative and would “just dodge the question.” She said that she specifically asked for an attorney before the police questioned her, although she was not specific in explaining this fact during her deposition for her post-conviction case. She said that she told Counsel about the request she made for an attorney prior to her interview with the police. The Petitioner said that she first requested an attorney from the patrol officer who drove her to the police station. She admitted that she signed the Miranda rights waiver, but she said that she did not understand that she did not have to speak to the officers after she had requested an attorney. She testified that she informed Counsel of these facts.

The Petitioner recalled that she informed Counsel about her relationship with her husband. She said that she told Counsel “[t]he general way that [her] husband would act towards [her]. [She] never knew how he would be when [she] got in. He refused to work. Everything was [her] responsibility]. And it was just constant and [she] did not feel that there was any way out” She said that she and Counsel discussed her co-defendant’s suicide, and Counsel told her that the suicide would not help her defense unless the suicide note exonerated the Petitioner and inculpated the co-defendant. The Petitioner recalled that her evaluation with Dr. Stuber lasted a mere fifteen minutes, and she said that she and the doctor only briefly discussed her relationship with her husband, without going into too much detail. She said that Counsel never really discussed the option of having an independent mental evaluation done for her defense, except to say that she had already been evaluated as competent and that her confession would make a diminished capacity or mental illness defense difficult to prove. The Petitioner testified that she and Counsel discussed the physical evidence in her case, and that Counsel explained that the gun in evidence had fingerprints on it from her, her husband, and her co-defendant. She recalled that Counsel explained the punishment ranges for both first degree murder and conspiracy to commit murder, and she stated, “Basically, [Counsel] was telling me that there was no way I would ever not serve time.” The Petitioner said that Counsel had a law student review her case, but she did not know of any outside investigator being hired.

She explained that she pled guilty because she did not feel she had another choice, and she believed she had no chance to be found not guilty at trial. The Petitioner testified that she would not have pled guilty if Counsel had presented her with viable options as to a defense based on battered wife’s syndrome or if he had gotten her confession suppressed. She recalled reviewing the plea petition paperwork with Counsel, and she said that Counsel explained that, for first degree murder, the State would be required to prove premeditation, which Counsel said her confession would prove. She said that, although Counsel went over the elements of the lesser-included charges of murder “to an extent,” Counsel said that the evidence favored premeditation and not the lesser-included

offenses.

On cross-examination, the Petitioner testified that she completed high school, took one semester in college, and, at the time of the offense, she was working in medical billing and collections. She recalled giving her deposition in this post-conviction case, and she said that she reviewed that deposition. She affirmed that she received copies of both the videotaped statement that she gave to the police and the transcripts of this statement. The Petitioner denied receiving a copy or transcript of the co-defendant's statement to the police, and she said that she was not aware that Counsel had access to this statement. She testified that she knew that the co-defendant's statement could have been used as evidence in her trial for conspiracy to commit murder. She recalled stating that the officer to whom she allegedly requested an attorney was the patrol officer who drove her to the police station, and she admitted that she had no further contact with the officer. She said that, during her deposition, she only said that she asked for a phone call, and not an attorney, because she was nervous. She admitted that she and Counsel had discussed her post-conviction petition, and she was aware of the issues it contained, but she reiterated that she was not specific in the deposition because she was nervous. She recalled receiving her Miranda rights and waiving those rights, and she agreed that she never made a request for an attorney at that time or any other time during the interview. The Petitioner admitted that she fully understood the nature of the police investigation, her Miranda rights, and "what was going on" at that time.

The Petitioner testified that her statement to the police contained no reference to any mental defect or disorder. She said that she has never sought treatment for, or been diagnosed with, any mental defect or disorder. She admitted that, at the time of the shooting, her husband was not making any threats toward her. The Petitioner recalled her guilty plea submission hearing. She remembered the trial court questioning her about her rights and whether she wished to go to trial. She said that she did not want to go to trial at that point. She recalled testifying that Counsel had done a good job and that he had given her access to everything in her case file. She recalled stating that there was nothing she wanted Counsel to do that he had not done. She explained that she did not feel at the time that Counsel had done a good job, but she did not feel there was anything she could do about it. She admitted that the trial court was open to hearing what she had to say when she pled guilty, and she said that no one had done anything to intimidate her.

The Petitioner testified that, although she did not feel that Dr. Stuber's evaluation was a thorough exam, she had no training or personal experience with psychological and psychiatric examinations. She was aware that the doctor had received prior information from her attorney upon which to base his evaluation. She understood what diminished capacity was, and recalled discussing that at her deposition. She remembered stating, at that time, that her husband only physically abused her once, throwing her against a wall, and the abuse was otherwise verbal and sometimes sexual.

On redirect examination, the Petitioner testified that, had Counsel informed her that she had a chance of getting convicted of a lesser-included charge if she used a battered wife's syndrome defense, she would have gone to trial. She said that, had counsel attempted to suppress her confession, and had it been successful, she would have gone to trial. The post-conviction court then

questioned the Petitioner regarding the guilty plea submission hearing. The Petitioner recalled that she told the trial court that she was pleased with Counsel, and that they had discussed all aspects of her case. She recalled telling the court that she and Counsel discussed battered wife's syndrome defense, and that Counsel did not think it was a viable option.

Following this evidence, the post-conviction court stated:

[T]he allegation here is that of ineffective assistance of counsel. . . . And to go through each one of these allegations: The petitioner avers that her appointed counsel failed to properly investigate the facts in the case and potential defenses in this matter. And failed to attempt to suppress the statements that she made to law enforcement authorities prior to being appointed counsel, despite her request.

[Petitioner], based upon the testimony I've heard today, I think your attorney adequately investigated this case. He certainly discussed with you any potential defenses and made a strategy decision in regard to suppressing the evidence.

The petitioner avers that she requested counsel before she gave her statements and was questioned by the [police], and this officer detected her to provide statements which were incriminating after she requested the assistance of an attorney.

Basically, there is no proof in the record at all of that, except [the Petitioner's] testimony from the stand today. When I asked . . . about it when [the Petitioner] first entered [her] plea, there were no complaints. When [the Petitioner] gave this deposition on April 11th, this was not mentioned. And . . . changing the story today has not convinced me by . . . clear and convincing evidence.

Next, the [P]etitioner avers that her counsel did not seek to suppress the statements given by her to at any time prior to the proceedings. Based upon the proof . . . in this case, [Counsel] met the obligation, was well within the range of competence demanded of attorneys when he investigated . . . whether or not to try to suppress these statements.

Next, the petitioner avers that her attorney failed to investigate her possible defenses, such as a battered wife syndrome and others which may have provided her with a defense. Simply, that's just not a truthful statement. Based on the proof I've heard today, [the Petitioner] and [her] attorney both talked [about] that. [The Petitioner was] smart enough to investigate it [her]self. And just because [it was] decided not to pursue that, that is not a basis for post-conviction relief.

Next, the petitioner avers that her court appointed attorneys did not adequately investigate her defenses of the forensic evidence in the case before advising her to enter the plea. I don't believe [the Petitioner] carried [her] burden .

. . proving that by clear and convincing evidence.

Finally, the petitioner avers that her court appointed attorneys did not properly investigate the case. Did not attempt to suppress her statements made to law enforcement and did not advise her of these defenses and options prior to advising her to enter a guilty plea I think based upon the proof I've heard, that statement is simply not true.

The courts in this state accord great deference to the strategy and tactics employed by defendants attorneys Generally, therefore, the court would not second guess counsels choice of defense strategy, including decisions relating to the use of battered wife syndrome. The attorney is however required to make decisions of strategy and tactics in the informed manner with adequate preparation. And I'm going to find that that preparation did in fact take place.

Subsequently, the trial court dismissed the Petitioner's petition for post-conviction relief. It is from this judgment that the Petitioner now appeals.

II. Analysis

The Petitioner contends that her guilty plea was involuntary and unknowing due to the ineffective assistance of her Counsel. Specifically, the Petitioner avers that Counsel was ineffective because he: (1) failed to adequately investigate the possible defenses in the Petitioner's case; (2) failed to file a motion to suppress the Petitioner's statements; and (3) failed to investigate the facts of the case or file a request for discovery pursuant to Rule 16 of the Tennessee Rules of Criminal Procedure. The State counters that the Petitioner's pleas were both knowing and voluntary. We agree with the State.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. Tenn. Code Ann. § 40-30-103 (2003). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). Upon review, this court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999); Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which is overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. Id. at 457. The Tennessee Supreme Court has held that the issue of ineffective assistance of counsel is a mixed question of law and fact and, as such, is subject to de novo review. State v. Burns, 6 S.W.3d 453,

461 (Tenn. 1999).

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and Article I, section 9, of the Tennessee Constitution. Id.; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). This right to representation includes the right to “reasonably effective” assistance. Burns, 6 S.W.3d at 461. In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that “counsel’s representation fell below an objective standard of reasonableness,” Strickland v. Washington, 466 U.S. 668, 688 (1984), and that this performance prejudiced the defense, resulting in a failure to produce a reliable result. Id. at 687; Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993). To satisfy the requirement of prejudice, a petitioner must show a reasonable probability that, but for counsel’s unreasonable error, the fact finder would have had reasonable doubt regarding the petitioner’s guilt. Strickland, 466 U.S. at 695. This reasonable probability must be “sufficient to undermine confidence in the outcome.” Id. at 694; see also Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney’s performance within the context of the case as a whole, taking into account all relevant circumstances. Strickland, 466 U.S. at 690; State v. Mitchell, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney’s perspective at the time. Strickland, 466 U.S. at 690; Cooper, 849 S.W.2d at 746; Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and “should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462. Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980).

In cases involving a guilty plea or a plea of nolo contendere, the petitioner must show prejudice by demonstrating that, but for counsel’s errors, he would not have pleaded guilty but would have insisted upon going to trial. See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991). It is unnecessary for a court to address deficiency and prejudice in any particular order, or even to address both if the petitioner makes an insufficient showing on either. Strickland, 466 U.S. at 697.

A. Investigation into Defenses

The Petitioner first avers that Counsel was deficient because he failed to adequately investigate and pursue all available defenses. Specifically, the Petitioner contends that Counsel did not adequately pursue defenses of battered wife’s syndrome, mental incapacity, or other defenses. The State counters that Counsel adequately investigated the Petitioner’s potential defenses, and we agree. There was evidence that Counsel reviewed the mental evaluation done by Dr. Stuber at the

Guidance Center. Dr. Stuber concluded that the Petitioner did not have diminished capacity. Further, the Petitioner testified that she did not suffer physical abuse from her husband. She said that she informed Counsel of this fact, and Counsel affirmed that the Petitioner told him. Counsel testified that he considered possible defenses based on diminished capacity and battered wife's syndrome, but he concluded that these defenses were not likely to succeed. Counsel also explained that he discussed these defenses with the Petitioner. The Petitioner admitted to personally researching the defenses. The trial court questioned the Petitioner about these defenses as well, and the Petitioner informed the trial court that she was satisfied with Counsel's performance. Based on these facts, we cannot say that Counsel's representation fell below the standard of reasonableness demanded of criminal defense attorneys. Counsel investigated the defenses, and based on his research and discussions with the Petitioner, Counsel made a strategic decision. See Williams, 599 S.W.2d at 279-80. This issue is without merit.

B. Motion to Suppress

Next, the Petitioner contends that Counsel was deficient because he failed to file a motion to suppress the Petitioner's statement. The Petitioner testified that she asked the patrol officer for an attorney prior to her interview with the police. The Petitioner's deposition shows that the Petitioner stated that she asked the officer for a "phone call." She did not state that she requested counsel. The Petitioner received her Miranda rights, and she testified at the post-conviction hearing that she understood those rights but continued to speak with the officers. Counsel testified that he was aware of the facts surrounding the Petitioner's confession, and that he reviewed the video tape of the Petitioner's statement and the facts of the case with the Petitioner to determine if he had grounds for suppression. Counsel testified that he determined that he did not have grounds for suppressing the Petitioner's statement and decided not to file a motion to that end. In its findings, the post-conviction court determined that the Petitioner did not ask for counsel, and the Petitioner has not proven that the evidence preponderates against this finding. Thus, we cannot say that Counsel's performance was deficient for failing to file a motion to suppress the Petitioner's statement under these circumstances. This issue is without merit.

C. Investigation into the Law and Facts of the Case

The Petitioner's final contention is that Counsel was deficient in failing to adequately investigate the facts of her case. Specifically, the Petitioner alleges error in Counsel's failure to request a State funded investigator and his failure to file a motion for discovery pursuant to Rule 16 of the Tennessee Rules of Criminal Procedure. The State counters that Counsel conducted an adequate investigation. Counsel explained that he did not file a motion for discovery because the State had given him full access to their case file on the Petitioner and all evidence in the Petitioner's case. Whatley, the Petitioner's original counsel corroborated this fact. Further, Counsel explained that he did not request a State funded investigator because he employed a law clerk who was able to review all the evidence against the Petitioner, and Counsel had transcripts of the recorded evidence made at his own office's expense. He explained that he also reviewed the evidence and the tapes alone and with the Petitioner. Because he had access to all the evidence and witnesses

against the Petitioner, and because he employed a law clerk who was able to assist him in his initial investigation of the case, we cannot say, under the specific facts and circumstances of this case, that this constitutes deficient performance. Additionally, even if Counsel's investigation was deficient, the Petitioner has failed to provide any proof of how a more thorough investigation would have altered her decision to plead guilty. Thus, the Petitioner has failed to satisfy her burden of proof as to how Counsel's performance resulted in prejudice. This issues is also without merit.

III. Conclusion

In accordance with the foregoing reasoning and authorities, the judgment of the post-conviction court is affirmed.

ROBERT W. WEDEMEYER, JUDGE